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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 62

SAMUEL SPEVACK,

Petitioner,

—v.—

SOLOMON A. KLEIN,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF

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Cases:

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Opinions Below

The opinion of the Appellate Division of the Supreme Court of New York is reported at 24 App. Div. 2d 653. The memorandum opinion of the Court of Appeals, affirming the order of the Appellate Division, is reported at 16 N.Y. 2d 1048, 213 N.E. 2d 457. The order of the Court of Appeals amending its remittitur is reported at 17 N.Y. 2d 490, 214 N.E. 2d 373.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under Title 28 U.S.C. 1257 (3).

Question Presented

Whether an attorney—who engages in contingent fee personal injury practice under court rules requiring him to keep a special account of funds recovered on behalf of injured clients and to preserve all records and memoranda of the disposition thereof—has a Fifth Amendment right to refuse to produce any of the required records when duly subpoenaed by the court charged with the duty of supervising his professional conduct, and to interpose a blanket refusal to answer any question which might be asked relating thereto.

Statutes Involved

The pertinent constitutional and statutory provisions are set forth in the Appendix to this brief. They are: (1) the Fifth and Fourteenth Amendments to the United States Constitution, (2) section 90, subd. 2, of the New York Judiciary Law, and (3) the Rules of the New York Appellate Division regulating the conduct of attorneys who engage in personal injury practice on a contingent fee basis.

Statement of the Case

1.

The New York Appellate Division of the Supreme Court is charged by statute with the duty to supervise the professional conduct of attorneys and to censure, suspend or remove from office any attorney whose conduct is prejudicial to the administration of justice. N. Y. Judiciary Law, §90 (2). Pursuant thereto, the Court has for many years

promulgated Special Rules Regulating the Conduct of Attorneys who acquire financial interests in personal injury and property damage cases upon a contingent fee basis.[1]

The Rules were promulgated to meet a two-fold need. First, to maintain the contingent fee privilege for the benefit of accident victims with meritorious claims but financially unable to pay a fixed fee for representation by competent counsel; and secondly, to prevent commercialization of the legal profession by those who abuse the contingent fee privilege under the false conception that it is a license to trade in negligence cases in which the administration of justice and the interest of the client may be exploited for the financial benefit of the attorney. See *Gair* v. *Peck*, 6 N.Y. 2d 97, *cert. denied* 361 U.S. 374; MacKinnon, *Contingent Fees for Legal Services, A Study of Professional Economics and Responsibilities* (1964), published under the auspices of the American Bar Foundation; *Retainer and Closing Statements*, Seventh Annual Report of the Judicial Conference of the State of New York (1962) pp. 144-147.

To meet this two-fold need the Special Rules provide that every attorney who acquires a contingent fee interest in a claim for personal injuries, property damage or wrongful death must;

(1) File a retainer statement with the Appellate Division setting forth the terms of his contingent fee agreement

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[1] See Special Rules, effective January 1, 1940, Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department. Clevenger's Practice Manual, pp. 21-19 (1959), printed as an Appendix hereto. Effective July 1, 1960, the Rules were renumbered and amended to conform with those of the First Judicial Department. Civil Practice Annual (1965) pp. 9-23 to 9-26.

and, if he had five or more such retainers in the preceding year, state the source of the retainer (Rule 3);

(2) Deposit "forthwith" the funds he collects either by way of settlement or after trial "in a bank or trust company in a special account" and refrain from commingling the same with his own funds (Rule 4);

(3) Deliver to the client "a statement in writing setting forth the amount received . . . and the amount which he claims to be due for his services and disbursements, specifying the same separately" (Rule 4);

(4) Remit to the client the amount due the client before withdrawing from the special account his share for services and disbursements (Rule 4);

(5) Preserve "the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof, for the period of at least five years" after settlement or other termination of the case (Rule 5).

Breach of any of these Rules is declared to be professional misconduct within the meaning of the Judiciary Law (Rule 2).

2.

It was under the foregoing obligations that petitioner engaged in an extensive practice in personal injury claims on a contingent fee basis. In the seven and a half years that he filed retainer statements with the Appellate Divi-

sion he obtained 1,062 personal injury cases, an average of over 140 cases a year (R. 12-13, Exh. 1).[2]

No charges were made against petitioner (R. 41). But this extraordinary flow of contingent fee retainers into the office of a single practitioner prompted the court to call upon him, by subpoena *duces tecum* dated June 2, 1958, to produce specified records "pertaining to [his] business as an attorney" (R. 1). The subpoena directed him to produce the records at an Additional Special Term of the Supreme Court (Judicial Inquiry) established by the Appellate Division, Second Judicial Department, to inquire into "the evil practices [involved in the improper solicitation and handling of contingent-retainers in personal injury cases] with a view to enabling the court to adopt appropriate measures to eliminate them and to discipline those attorneys found to have engaged in them". *Cohen* v. *Hurley*, 366 U.S. 117, 119.

Petitioner challenged the validity of the subpoena in a separate proceeding to quash. The State courts overruled his objections, and on June 1, 1959, this Court denied a petition for certiorari. *Anonymous No. 14* v. *Arkwright*, 7 A.D. 2d 874, leave to appeal denied 5 N.Y. 2d 710, *cert. denied* 359 U.S. 1009.

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[2] The yearly rate of his retainers was as follows:

1953	119
1954	150
1955	154
1956	157
1957	155
1958	143
1959	129
1/1/60 to 6/30/60	55
Total	1,062 (R. 12-13, Exh. 1)

Thereafter several hearings were held at which petitioner was represented by counsel who actively participated in the proceedings (R. 19-51). The Inquiry's efforts to have petitioner produce the records in his possession were of no avail. Ultimately, on January 10, 1962, petitioner flatly refused under claim of Fifth Amendment privilege against self-incrimination to produce any one of the required records, and interposed a blanket refusal "to answer any questions in relation thereto" (R. 43).

These refusals constitute the dominant and controlling fact in the entire case. Beginning with petitioner's first appearance on June 12, 1958 and ending with his appearance in January 1962, the pivotal controversy was whether he would produce the records that he was required by the Special Rules to keep as a contingent fee practitioner in personal injury cases. The New York Court of Appeals, highest court of the State, in affirming the order of disbarment expressly held that petitioner had no Fifth Amendment privilege to refuse to produce the required records encompassed by the subpoena *duces tecum*, stating (16 N.Y. 2d 1048, 1050; R. 86, 88):

> ". . . the Fifth Amendment privilege does not apply to a demand, not for oral testimony, but that an attorney produce records required by law to be kept by him (*Davis* v. *United States*, 328 U.S. 582; *Shapiro* v. *United States*, 335 U.S. 1)."

And in its amended remittitur the Court of Appeals specified that it had overruled petitioner's contention that under the Fifth and Fourteenth Amendments he could not be disbarred for refusing to produce "any of the records" or "to answer any questions which might be asked relating thereto" (R. 90-91).

3.

It will aid this Court to make an accurate determination of the questions presented to consider the following chronological statement of the facts.

At his first appearance in response to the subpoena, petitioner asked the court for more time to assemble his records and to decide whether to retain counsel (R. 14-17). He assured the court that he never commingled funds received on behalf of clients with his personal funds, that such trust funds were deposited in a special bank account (R. 16), and that the records he was required to keep in this respect were in his check books (R. 17):

> "The Court: Where are those records that you are required to keep under Rule 4?
>
> Mr. Spevack: Sir?
>
> The Court: Where are the records you are required to keep under Rule 4, which is the rule requiring you to have set up a special account?
>
> Mr. Spevack: They are in my check book."

To enable petitioner to gather his records and consult counsel the court granted an adjournment (R. 17-19), and on the adjourned date granted a further extension at the request of petitioner's counsel (David Berman), who was expressly told that "the only concern" was as to petitioner's position "relative to the records" (R. 20).

Thereafter petitioner, as above noted, instituted a separate proceeding to quash the subpoena, which ultimately resulted in this Court's denial of petitioner's application for a writ of certiorari. *Anonymous No. 14* v. *Arkwright*, *supra*. Following such denial, petitioner and his counsel

were again told that all that was wanted by the Inquiry was that petitioner produce the subpoenaed records (R. 24-25; Tr. 42-45).[3]

At the next hearing on June 15, 1959, when another adjournment was requested:

> "Mr. Caputo [for the Inquiry]: Just to state our position your Honor . . . the subpoena has been sustained in its entirety and we would like for him to produce the documents. There is nothing that has to be done in court here.
>
> The Court: Isn't it that simple? I am going to grant you an adjournment. . . . Aren't we entitled to the documents?
>
> Mr. Berman: May I most respectfully indicate to your Honor that in my humble opinion the Court is not entitled to it . . ." (R. 24).

On the adjourned date, June 26, 1959, petitioner took the witness stand and on the advice of his counsel refused to produce the records upon the ground that "the production might tend to incriminate or degrade me or to subject me to some penalty or forfeiture" (R. 29). Petitioner further stated that he could produce available records but that he claimed privilege to refuse:

> "The Court: You had better state it again. The subpoena calls for the production of the books. They have not been produced.
>
> The Witness: Whatever records, your Honor, that were available to me, I could physically, if I had obtained the time, get them together in a package and in a bundle and bring them here alongside of me. . . . Therefore, if I may say, the matter of produc-

[3] References designated as "Tr." are to the typewritten transcript of the proceedings.

tion of the books, or of having them here physically is not in issue.

The Court: All right, leave that out now.

Mr. Berman: Thank you.

The Witness: That the only matter in issue is the refusal to turn them over" (R. 31-32).

Not a single question was asked of petitioner either as to the contents of the records he refused to produce or as to his conduct in the acquisition or processing of his contingent fee cases. The court did inquire "whether, assuming they (the records) were here, and assuming reference was made to them by counsel, and questions asked with respect to them, whether the witness's answer would be a refusal upon the basis that his answer might tend to incriminate him." In response thereto petitioner and his counsel stated that their position would be "definitely so" (R. 32).

Since, as stated by the court, this raised "a very serious question" that was to be determined in a case involving another lawyer (R. 30), the court suspended the hearing pending determination of the other case (R. 33-34). The case referred to was decided by this Court in April 1961. *Cohen* v. *Hurley*, 366 U.S. 117; rehearing denied in 1963, 374 U.S. 857, and again in 1964, 379 U.S. 870.[4]

[4] It is here appropriate to note that the controversy upon which this Court divided five to four in the *Cohen* case was not with respect to Cohen's refusal to produce records, but rather his refusal "to answer some sixty other questions" that he claimed would incriminate him. See Mr. Justice Harlan's opinion 366 U.S. at 120, and Mr. Justice Black's dissenting opinion at 133, note 3, where it is stated: ". . . And the record shows throughout that the whole controversy has hinged around the question of the power of the State, under both the State and the Federal Constitutions, to force him to answer the questions he had been asked at the inquiry. Under these circum-

After the *Cohen* decision petitioner wrote a letter, dated June 29, 1961, requesting permission to appear "in connection with the Appellate Division's Inquiry" (Tr. 145-146, Exh. 3). And then on July 6, 1961, his counsel forwarded to the Presiding Justice another letter signed by petitioner in which he said:

> "In view of the recent decision by the Supreme Court in the Cohen matter, I hereby state that I wish to withdraw the constitutional privilege against incrimination heretofore interposed by me before your Honor, during the course of the Judicial Inquiry, which I then asserted in good faith, upon the advice of counsel, and in the sincere belief that I then had the right to do so.
>
> I am willing to testify and answer questions concerning relevant matters" (R. 52, Exh. 4).

Pursuant thereto, petitioner's counsel appeared at the Inquiry on September 5, 1961 (R. 34). He stated that there would be no objection "per se" to delivering the financial records for inspection by the Inquiry, but that some of the items did not exist and that "at the right time we could explain what is available." The court replied:

> "All we want are the records which he keeps" (R. 35).

This request was repeated one month later when counsel requested a further adjournment:

> "The Court: For the present we are concerned with the production of the records on the adjourned date. They will be produced?

---

stances, I cannot allow to pass unnoticed the violation which I think has occurred with respect to petitioner's rights under the Fifth Amendment."

> Mr. Berman: At that point that which can be produced will be produced" (R. 38).

Thereafter petitioner discharged Mr. Berman and retained new counsel (R. 38-39). His new counsel, Bernard Shatzkin, appeared at the Inquiry on October 23, 1961, at which time he, too, was told that the "only" thing wanted was that petitioner "produce the records in compliance with the subpoena" (Tr. 96). And before granting an adjournment:

> "The Court: How about the production of the records counsel?
>
> Mr. Shatzkin: If your Honor pleases, we intend to produce the records called for by the subpoena. We had made all those arrangements on Friday. We intended producing them here this morning" (R. 39-40).

And finally, after a further adjournment to January 10, 1962 (R. 40), petitioner appeared with his counsel, but not with the records. Instead, he sought more delay. This time the court denied the request and directed that the records be produced (R. 40-41).

Thereupon counsel revealed that he had advised petitioner that "in the event" a further adjournment were denied, he should "assert all of his constitutional privileges" (R. 41). And when petitioner was called to the witness stand he stated:

> "I have conferred with my counsel, Mr. Shatzkin, at length, and he has advised me, after examining the law, and relying upon his advice to me as a lawyer . . . [I am] obliged not to produce any of the records or to answer any questions in relation thereto . . ." (R. 43).

The grounds he asserted encompassed the State and Federal privilege against self-incrimination, the right to due process of law and to equal protection of the laws (R. 43). He interposed these claims as to each record called for by the subpoena *duces tecum* (R. 43-44).

Petitioner was then informed that disciplinary proceedings would be instituted against him (R. 45).

In affirming the order of disbarment the New York Court of Appeals wrote a memorandum opinion in which it held (16 N Y 2d 1048, 1050):

> "Order affirmed on the authority of *Cohen* v. *Hurley* (366 U.S. 117) and on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony, but that an attorney produce records required by law to be kept by him (*Davis* v. *United States*, 328 U.S. 582; *Shapiro* v. *United States*, 335 U.S. 1)."

Thereafter the Court amended its remittitur which reads as follows (R. 90-91):

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellant contended that his disbarment, based upon his refusal to produce any of the records specified in the subpoena duces tecum, duly issued in a judicial inquiry into professional conduct, and based upon his prior refusal to answer any questions which might be asked relating thereto, violated his constitutional privilege against self-incrimination and his constitutional right to due process of law. The Court of Appeals held there was no violation of any of the appellant's constitutional rights."

ARGUMENT

Petitioner's refusal to produce any records he was required by the Special Rules to keep as an attorney engaged in contingent fee personal injury practice is not encompassed by the Fifth Amendment privilege against compulsory self-incrimination.

A valid claim of Fifth Amendment privilege against compulsory self-incrimination is protected through the Fourteenth Amendment from infringement by the States. *Malloy* v. *Hogan*, 378 U.S. 1. The New York Court of Appeals was not unaware of its obligation under the *Malloy* decision. Indeed, it applied the same standards as prevail in the federal courts. For as stated in *Malloy* at p. 11:

> "It would be incongruous to have different standards determine the validity of a claim of privilege . . . depending on whether the claim was asserted in a state or federal court."

Thus the Court of Appeals held on the authority of this Court's decisions in *Shapiro* v. *United States*, 335 U.S. 1 and *Davis* v. *United States*, 328 U.S. 582, that petitioner, who was subject to the Special Rules regulating contingent fee practice, had no Fifth Amendment privilege to refuse to produce the "records required by law to be kept by him." *Matter of Spevack*, 16 N.Y. 2d 1048, 1050. This basis for affirming the order of disbarment was incorporated in the Court's order of affirmance, which remitted the case to the Appellate Division "there to be proceeded upon according to law" (R. 87-88). And on the remittitur the Appellate Division made the order of affirmance the order of that Court (R. 89-90).

In the *Shapiro* case, *supra*, this Court held that "the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established'."

This constitutional principle is not, as petitioner contends, an unwarranted or novel conception of the legitimate limits of the Fifth Amendment privilege against compulsory self-incrimination. As shown by the cases cited in the *Shapiro* opinion, the roots of this principle reach as far back as *Boyd* v. *United States*, 116 U.S. 616, where Mr. Justice Bradley carefully distinguished between purely private records and "books required by law to be kept" which were held to be "necessarily excepted out of the category of unreasonable searches and seizures."

The other cases cited in the *Shapiro* opinion further show that this Court has repeatedly approved and applied the required records doctrine as a constitutionally valid limitation of the Fifth Amendment privilege against compulsory self-incrimination. Its application to the facts in the instant case is, we submit, beyond reasonable dispute. The records of his special bank account, his check books, check stubs and other financial data pertaining to his contingent fee business are clearly within the valid requirements of Special Rules 4 and 5. Petitioner refused to produce any one of them. Since he has no privilege to repudiate the duties he voluntarily assumed by engaging in an extensive personal injury practice on a contingent fee basis, the Court has the right to revoke its certification of

petitioner to the public as an attorney who will account for the performance of his professional obligations.

As demonstrated in our Statement of the Case, petitioner's refusal to produce the required records as to which he has no valid privilege is the dominant and controlling fact throughout the proceedings at the Judicial Inquiry. His disbarment therefore rests on a wholly adequate State ground, requiring an affirmance of the judgment of the Court of Appeals. *Lanza* v. *New York*, 370 U.S. 139.

Little need be said with respect to petitioner's other arguments. The facts heretofore set forth demonstrate that no demand was made for oral testimony that might tend to incriminate him. As stated in the Court of Appeals' amended remittitur, petitioner had refused "to answer any questions *which might be asked* relating" to the records (R. 90-91). In the circumstances of this case he had no such constitutional right.

Finally, the contention that he was entrapped to believe that he had a Fifth Amendment privilege to refuse to produce the records is utterly absurd. Here, again, the facts above set forth show that his contention is a convenient afterthought.

CONCLUSION

For the foregoing reasons and on the facts related the judgment of the Court of Appeals of the State of New York should be affirmed.

Respectfully submitted,

SOLOMON A. KLEIN
Respondent, Attorney Pro Se

APPENDIX

United States Constitution, Amendment V

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

United States Constitution, Amendment XIV

Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Section 90 of New York Judiciary Law

1. . . .

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct . . . or any conduct prejudicial to the administration of justice. . . .

Special Rules Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department

Rule 2. Penalty. An attorney who violates any of these special rules shall be deemed to be guilty of professional misconduct within the meaning of subdivision two of section 90 of the Judiciary Law.

Rule 3. Statements as to retainers in actions or claims arising from personal injuries. . . . Every attorney who, in connection with any action or claim for damages for personal injuries . . . accepts a retainer or enters into an agreement, express or implied, for compensation for serv-

ices rendered or to be rendered in such action, claim or proceeding, whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within thirty days from the date of any such retainer or agreement of compensation, sign and file in the office of the clerk of the Appellate Division, Second Judicial Department, a written statement setting forth the date of any such retainer or agreement of compensation, the terms of compensation, the name and home address of the client and the name and office address of the attorney, and the date and place of the occurrence of the injury. . . .

Rule 4. Deposit of collections-notice. Where an attorney who has accepted a retainer or entered into an agreement as referred to in the preceding rule, shall collect any sum of money upon any such action, claim or proceeding, either by way of settlement or after a trial or hearing, he shall forthwith deposit the same in a bank or trust company in a special account, separate from his own personal account and shall not commingle the same with his own funds. Within ten days after the receipt of any such sum he shall cause to be delivered personally to such client or sent by registered mail, addressed to such client at the client's last known address, a statement in writing setting forth the amount received, the date when and the name of the person from whom he received the same, and the amount which he claims to be due for his services and disbursements, specifying the same separately. At the same time the attorney shall pay or remit to the client the amount shown by such statement to be due the client, and he may then withdraw

for himself the amount so claimed to be due him for compensation and disbursements. . . .

Rule 5. Preservation of records of actions, claims and proceedings. In every action, claim and proceeding of the nature described in rule three, attorneys for all the parties shall preserve the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof, for the period of at least five years after any settlement or satisfaction of the action, claim or proceeding or judgment or final order thereon, or after the dismissal or discontinuance of any action or proceeding brought.